IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6494 of 1984

For Signature:

Hon'ble ACTING CHIEF JUSTICE MR.JN BHATT
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ORIENT ABRASIVES LTD

Versus

GUJARAT ELECTRICITY BOARD

Appearance:

1. Special Civil Application No. 6494 of 1984
MR SB VAKIL, SR. ADVOCATE WITH
MS ARCHANA R ACHARYA for the Petitioners.
MR MD PANDYA for the Respondents

CORAM : ACTING CHIEF JUSTICE MR.JN BHATT
and
MR.JUSTICE A.L.DAVE

Date of decision:22/08/2003

C.A.V. JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The petitioner, which is a public limited company registered under the Companies Act and consumer of electricity supply of respondent No.1, has preferred this petition under Article 226 of the Constitution of India to challenge the constitutional validity of Section 24 of the Indian Electricity Act and the decision of respondent No.1 not to consider grant of relaxation in the minimum consumption bill if the interruption in power supply is not more than 30 hours in a month, if it has not affected the "load factor" on account of interruption in power supply. The petitioner also challenges notice issued by respondent No.2 to the petitioner calling upon them to make the payment or to face disconnection of the power supply.

2. The case of the petitioner is that the petitioner is a company engaged in manufacture of Abrasives Calcined Bauxite and other allied products at the GIDC Industrial Estate, Porbandar. The manufacturing process is such that it has to be run continuously and in event of any interruption in the process, resumption of the process requires special efforts and generation of heat calling for consumption of electricity without any production. It is the case of the petitioner, therefore, that the petitioner-industry has been treated as a "continuous process industry". Enjoying electricity supply for industrial purpose, an agreement was entered into by the petitioner and respondent No.1 in 1971. The dispute arose only in 1980-81 when respondent No.1 served with "Annual Minimum Bill" in the year 1980-81. According to the petitioner, this was in violation of the agreement as there was interrupted supply of electricity during this period which disrupted the manufacturing process. The petitioner, therefore, prayed for relaxation in the bill, which respondent No.1 refused to do and served with a notice under Section 24 of the Electricity Act that, if the payment of the amount is not made, the power supply may be disconnected. It appears that, there was correspondence between the petitioner and the respondents, but in vein. The petitioner has, therefore, approached this Court seeking following reliefs :-

"(a) to declare that Section 24 of the Indian Electricity Act, 1910 is void'

(b) to quash and set aside the conditions contained in the Board's decision

communicated to the petitioner by the letter dated 25.11.1983 of the Board's Commercial Manager (copy at Annexure 'A') viz. that the relaxation therein referred to is subject to:

(i) the power interruption being for a period over hours in a month,

(ii) the relaxation is in respect of hours of interruption in exercise of 30 hours in a month, and

(iii) the consumer could not maintain his Load Factor on account of the power interruption,

(c) to quash and set aside the revised Annual Minimum Bill (copy at Annexure 'I') for the year 1980-81 for Rs.6,39,423.45 p. served on the petitioner with the letter dated 9.12.1983 of the Executive Engineer (City), Porbandar of the Board,

(d) to quash and set aside the disconnection Notice dated 20.12.1984 (Copy at Annexure 'B') served on the petitioner by the Board,

(e) to restrain the respondents pending the hearing and final disposal of this petition from disconnecting the power supply to the petitioner pursuant to the disconnection notice dated 20.12.1984 served upon the petitioner for non-payment of any demand contained therein,"

3. Learned Senior Counsel, Mr. S.B. Vakil, for the petitioner submitted that the respondent has wrongly issued the Annual Minimum Bill and the notice under Section 24 of the Act. There was interruption in supply and, therefore, the petitioner could not use the power properly because the petitioner's industry has been classified as 'continuous process industry'. The decision of non-grant of relaxation in the bill is discriminatory. The demand made in the notice under Section 24 of the Act includes amount which is not due as contemplated under the Act. Mr. Vakil submitted that,

in case of genuine and debatable disputes and consequent non-payment of bill cannot be considered as a neglect to pay the bill. The notice includes wrongly the delayed payment charges. Learned Senior Counsel, Mr. Vakil, however, submitted that the vires of Section 24 challenged in this petition is not seriously pressed by the petitioner in light of the settled legal proposition. Mr. Vakil submitted further that the criteria fixed for rejecting the relaxation, namely, grant of relaxation only if the interruption in a month is more than 30 hours which has affected the power factor. It was submitted that in a continuous manufacturing process industry, if there is a break in supply, the industry is required to consume power without any outcome only to put the machines to their original standard when the supply was stopped and, therefore, the criterion for grant or refusal of remission in the bill is not justified. It is unreasonable and unconstitutional. Learned Senior Counsel, Mr. Vakil, also submitted that the burden to show that the condition is reasonable is on the respondent-Board. Learned Senior Counsel, Mr. Vakil, relied on several decisions in support of the petition and urged that the petition may be allowed.

4. The petition is opposed to by learned Advocate, Mr. M.D. Pandya. The first and foremost submission of Mr. Pandya is that, in substance, the petitioner disputes the non-grant of remission in the Annual Minimum Bill. Mr. Pandya submitted that the issuance of Annual Minimum Bill is also challenged. In any event, the dispute spins around a contractual relationship and/or contractual rights and obligations. The petition under Article 226, therefore, cannot be entertained. Mr. Pandya submitted that relaxation which is sought is only a grace that is sought from the respondent-Board and not a legal right. No legal right vests in the petitioner, which can be said to have been affected. Mr. Pandya submitted that the agreement between the parties and the tariff applicable to the supply of power by respondent-Board to the petitioner are not in dispute. He has drawn attention of this Court to Section 22 of the Indian Electricity Act and Section 26 of the Electricity Supply Act and submitted that Section 26 will not be applicable to cases falling under Section 22 of the Indian Electricity Act. Mr. Pandya submitted that tariff is framed under Section 49 of the Electricity Act in case accepted to be applicable by the agreement between the parties. He, therefore, submitted that application of tariff would be a part of the contract. The special tariff or special concession which is sought in the form of remission in bill because of interruption

in power supply is only a bargain or fixation under Section 49(2) of the Act, which would be purely contractual. Grant of relaxation is not under the Act or tariff. He submitted that relaxation is, therefore, to be construed as a contract and not as a statutory action. Mr. Pandya has drawn attention of this Court to an earlier decision of this Court in Special Civil Application No.679 of 1984 dated 16.10.1984 between these very parties. He urged that the petition may, therefore, be dismissed.

5. Having regard to the contentions raised before us, we find that, by this petition, in substance, what is under challenge is the condition for relaxation in the bill issued by respondent-board on the petitioner. The challenge to constitutional validity of Section 24 of the Indian Electricity Act is not pressed by learned Senior Counsel, Mr. S.B. Vakil.

6. A xerox copy of the agreement entered into between the parties has been produced before us and there is no dispute between the parties regarding its genuineness. Likewise, tariff of power intensive industries, as then applicable, has also been produced. There is no dispute about the genuineness of the copy as well.

7. We have given a close scrutiny to the agreement as well as the tariff and it would be appropriate to record that the tariff provides for Annual Minimum Charges and the method of computation thereof. The agreement also provides for minimum guarantee with a specific covenant that the consumer would be billed for actual energy consumed every month subject to monthly minimum and the difference between the guaranteed minimum charges and the actual charges paid (if the same are less than the guaranteed minimum) by the consumer for each 12 months' period shall on presentation of a bill therefor at the end of each 12 months' period be payable by the consumer within 20 days of the bill.

8. It has been vehemently contended and demonstrated by learned Advocate, Mr. Pandya, for the respondent that the load factor remained unaffected during the period during which there was interruption in power supply and, as such, the petitioner is liable to pay minimum charges. This aspect is disputed and countered by learned Senior Counsel, Mr. S.B. Vakil, appearing for the petitioner and it was tried to be indicated that the load factor was, in fact, affected. Be that as it may, it would call for an examination and adjudication on disputed question

of fact which can be decided from factual evidence that may be led by the parties and which may call for technical assistance to ascertain whether, in fact, the load factor was affected or not.

9. The undisputed fact is that the parties have entered into an agreement whereunder their inter se rights and obligations are defined. Liability for a minimum consumption bill amount is accepted by the petitioner. It is true that, on some occasions during the period in question, there was interruption in supply of electricity, but the question that really arises is whether that interruption has resulted into disturbance to the power factor. Apart from that, it has to be borne in mind that clause for Minimum Energy Charges carries a purpose and policy with it. The minimum charges necessarily meant to cover the charges for supply of energy, but it also includes charges for the right to use the power as well as on the principle that every consumer's installation would involve a certain amount of capital expenditure in plant and mains on which the supplier was supposed to have a reasonable return. In Saila Bala Roy v. Chairman, Darjeeling Municipality, AIR 1936 Cal. 265, the above proposition was laid down, which has been approved by the Apex Court in Bihar S.E.B. v. Green Rubber Industries, (1990) 1 SCC 731.

10. In Raymond Ltd. v. M.P. Electricity Board, (2001) 1 SCC 534, the Apex Court observed that, "As a matter of general principle, any stipulation for payment of minimum guarantee charges is unexceptionable, in a contract of this nature wherein the Board which undertakes generation, transmission and supply of electrical energy has to, in order to fulfil its obligation lay down lines and install the required equipment and gadgets and constantly keep them in a state of good repair and condition to render it possible for the consumer to draw the supply required at any and all times." The Court also observed that, "if either in the general conditions and terms of supply or the contract or the tariff rates as the case may be there is any stipulation, in clear and unmistakable terms that the liability relating to the payment of guaranteed minimum charge could or will be enforced irrespective of the actual consumption rate of the consumer or even dehors the capacity or otherwise of the Board to supply even the minimum of the contract demanded energy, there could be no valid objection in law for any such stipulation being made and the consumer will be bound to honour such commitment."

11. In the case before us, there is no dispute that there is a stipulation in the tariff as well in the memorandum of agreement entered into between the parties. A stipulation regarding liability to pay Minimum Annual Consumption Charges and method of computing thereof is also indicated. The dispute that is raised is regarding the non-grant of remission or concession in such minimum bill. The challenge is on the ground of unreasonableness of the conditions, namely, that the concession or remission can be given only if the interruption in power supply during the month is exceeding 30 hours. Therefore, again, there would be dispute on factual aspects as to whether the interruption has affected the load factor. In any event, it would be interesting to note what the Apex Court has observed in the case of Raymond Ltd. (supra). The Apex Court observed thus :

> "The recurring commitments relating to constant and periodical maintenance of supply lines and other installations cannot be anytheless even during such times and such onerous liabilities cannot be left to fall exclusively upon the Board and it is only keeping in view these aspects, payment of minimum guaranteed charges is necessarily inbuilt in the tariff system of the Board and the reasonableness or legality of the same cannot be considered either in the abstract or in isolation of all these aspects. It is for this reason that all over the consumer is also made to share the constraints on the Board's economy even during such periods. In fact the tariff inclusive of such a provision for payment of a minimum guaranteed sum irrespective of the supply/consumption factor appears to be the consideration for the commitments undertaken by the Board as a package deal and it is not possible or permissible to allow the consumer to wriggle out of such commitments merely on the ground that the Board is not able to supply at any point of time the required or agreed quantum of supply or even supply upto the level of the minimum guaranteed rate of charges. Tinkering with portions of contracts for any such reasons, merely on considerations of equity or reasonableness pleaded for vis-a-vis one party along will amount to mutilation of the whole scheme underlying the contract and render thereby the very generation and supply of electrical energy economically unviable for the Board. Consumers, who enter into such commitments openly

> and knowing fully well as these hazards involved in the generation, transmission and supply will be estopped from going behind the solemn commitment and undertaking on their/its part under the contract."

12. In view of the above observations, in our opinion, this petition cannot be entertained for the reason that, undisputedly, the tariff and the memorandum of agreement have a covenant regarding minimum energy charges payable by the consumer/petitioner. By and large, there has been regular supply of electricity barring certain interruptions, as indicated with uniformity by the parties. The question whether the interruption affected the load factor or not would be dependent on many technical and factual aspects and on that would be dependent the question whether relaxation in Annual Minimum Bill for the relevant period can be granted to the petitioner. This would call for detailed factual, material and technical assistance to ascertain. Apart from these aspects, the observations made by the Apex Court in the case of Raymond Ltd. (supra) make it amply clear that the consumer is estopped from raising such issues for various reasons indicated therein. We, therefore, do not deem it proper to grant any indulgence to the petitioner.

13. It was vehemently contended that the notice was given by the respondent in exercise of statutory right/power and, therefore, the doctrine of reasonableness has to be satisfied by the respondent while not accepting the request for grant of remission in the bill. In this context, the decision of the Apex Court in M/s Hyderabad Vanaspathi Ltd. v. Andhra Pradesh S.E.B. and Others, AIR 1998 SC 1715, relied upon by learned Senior Counsel, Mr. Vakil, may be examined. The Apex Court did not uphold the view of the High Court that the terms and conditions of supply are purely contractual. By no stretch of imagination, can it be said that, it has been held that it is purely statutory. Apart from this, although the notice under Section 24 of the Act is not under challenge, the real dispute is not with the notice, but with grant of remission or concession in the noticed amount, on basis of a subsequent application made by the petitioner. The contention, therefore, cannot be accepted.

14. Since learned Senior Advocate for the petitioner has not pressed the challenge to the constitutional validity of Section 24 of the Indian Electricity Act, we

do not propose to deal with that aspect and give a verdict on it.

15. In view of the above discussion, we are of the clear opinion that, none of the reliefs sought in the petition can be granted in favour of the petitioner and the petition, therefore, must fail. The petition stands dismissed. Rule is discharged with no order as to costs. Interim relief is vacated.

[J.N. BHATT, ACTG. C.J.]

[A. L. DAVE, J.]

16. The learned Advocate for the petitioner has requested that since the petitioner is desirous of availing further legal redressal, the operation and implementation of this judgment may be stayed for a period of four weeks. The learned advocate Mr. Pandya has opposed this request contending that the matter is of 1984 and dues are not paid since long, and the petitioner has lost, no time can be granted.

17. After having heard the learned advocates appearing for the parties and considering the very fact that the dispute is unfortunately remained pending for a long spell of almost about 17 years. in the larger interest and more so when the petitioner is inquisitive to pursue legal remedy in the higher forum, four weeks time is granted. This judgment shall not be executed for a period of four weeks from today on the same conditions as imposed while interim relief came to be granted by this Court on 12.8.1985.

[J.N. BHATT, ACTG. C.J.]

[A.L. DAVE, J.]

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